BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF TEXACO REFINING AND MARKETING, INC., Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 85-53 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of a $10,000 civil penalty for an alleged violation of WAC 173-303-400(3) of respondent's hazardous waste management regulations, came on for hearing before the Pollution Control Hearings Board, Lawrence J. Faulk, Chairman, Gayle Rothrock and Wick Dufford, Members, convened at Lacey, Washington, on August 22, 1985. Administrative Appeals Judge William A. Harrison presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Appellant appeared by its attorney Mauryne S. Fennell. Respondent

appeared by its attorney, Allen T. Miller, Jr., Assistant Attorney General. Reporter Bibi Carter recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. From testimony heard and exhibits examined, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

This matter concerns the Texaco oil refinery at March Point near Anacortes.

II

The refinery commenced operations in 1958, and processes crude oil into petroleum products, primarily motor fuels.

III

Texaco disposes of sludges, tank bottoms and other hazardous refinery wastes on the refinery site. It does so by plowing the wastes into the ground on two six-acre tracts, then treating the tracts biologically to neutralize the waste.

IV

Under the Federal Resource Conservation and Recovery Act of 1976 ("RCRA" at 42 U.S.C., Sec. 6901, et. seq) and the state Hazardous Waste Act (ch. 70.105 RCW) the Texaco refinery is classified as a "land treatment facility" for hazardous waste.

V

As of 1981, the Texaco refinery, being classified as a land treatment facility for hazardous waste:

> ...must implement a ground water monitoring program capable of determining the facility's impact on the quality of ground water in the uppermost aquifer underlying the facility...

40 CFR Part 265, Subpart F, Section 265.90 as adopted by reference in Department of Ecology WAC 173-303-400(3).

VI

In 1982, Texaco installed four ground water monitoring wells in response to this regulatory requirement.

VII

In and prior to 1982 the Texaco waste water treatment facility was designated as a hazardous waste facility under RCRA regulations. The 1982 Texaco monitoring wells were positioned, accordingly, to monitor the waste water facility. Subsequent to construction of the 1982 wells, the waste water treatment facility was apparently determined by the U. S. Environmental Protection Agency (EPA) to be excluded from ground water monitoring requirements because such facilities are governed by provisions of the National Pollutant Discharge Elimination System. This caused the well nearest the waste water facility to be incorrectly located relative to the new EPA determination.

VIII

In 1983, EPA engaged the services of Battelle to conduct an independent review of the Texaco 1982 ground water monitoring wells. Battelle, in addressing depth of the wells, distinguished between a shallow "perched" aquifer at the site and a deeper "regional" aquifer. Battelle found two Texaco wells in the "perched" aquifer,

and recommended to EPA that these be deepened to enter the "regional" aquifer "as required by 40 CFR Part 265.91," a regulation of EPA.

IX

On February 17, 1984, Department of Ecology (DOE) issued a regulatory order (No. DE 84-164) to Texaco requiring a new ground water monitoring plan. That order was appealed to this Board as PCHB No. 84-84.

X

During settlement negotiations of PCHB No. 84-84, DOE communicated to Texaco its disagreement with Battelle's interpretation of EPA regulations regarding preference for the regional aquifer only. Under WAC 173-303-040(102) DOE asserts that the perched aquifer must be monitored, although it is quite near to land surface and involves low permeability and minimal water production. Texaco acceded to this interpretation.

XI

Texaco commenced the design of seven new ground water monitoring wells in April, 1984. In doing so it referred to DOE's WAC 173-303-400(3)(c)(v) on how to construct a well to monitor potential ground water contamination. That rule then provided:

> ground water monitoring wells shall be designed, constructed, and operated so as to prevent ground water contamination in accordance with chapter 173-160 WAC. New ground water monitoring wells shall have an inside diameter of not less than four inches (10 cm.). (Emphasis added.)

Chapter 173-160 WAC addresses water wells, rather than wells for

monitoring ground water contamination.

XII

Chapter 173-160 WAC, referred to above, provides for an 18-foot deep annular space around the well casing to be filled with cement grout. WAC 173-160-130.

XIII

Texaco designed its proposed 7 new wells with a minimum 4-inch diameter, surrounded by a minimum 18-foot depth of cement-bentonite grout in reliance on DOE regulations. It apparently did not highlight this point in discussions with DOE. Neither did DOE highlight to Texaco that its regulation requiring adherence to chapter 173-160 WAC was being amended effective May 17, 1984, to make chapter 173-160 WAC advisory only, rather than mandatory.

XIV

On May 15, 1984, Texaco and DOE signed an agreed order in PCHB No. 84-84 which was entered by this Board settling the appeal of the February regulatory order (DE No. 84-164). The agreed order contemplated the proposed new wells.

XV

By June 14, 1984, Texaco installed the seven new ground water monitoring wells using the above described construction techniques. These wells monitored the perched aquifer. The wells were installed at a cost to Texaco of $25,000.

XVI

Five of the seven new wells did not work. That is to say, the

wells were intended to monitor pH as a parameter of ground water contamination. The pH values in the wells were so abnormally high as to indicate that the cement grout of the well caused those pH values.

XVII

The deep (18-foot) cement grout prescribed by DOE regulation placed cement in very close proximity to the water drawing portion of the well. Moreover, the 4-inch well diameter prescribed by DOE regulation made it difficult to insert a seal of bentonite down the gap between the 4-inch casing and 6-inch opening into which it had to be inserted, given usual construction methods.

XVIII

Two of the seven new wells did not have the cement pH problem. These two were located in soil of higher permeability and naturally higher water production. In an effort to increase water production in the non-functional wells, and hopefully leach away the effects of the cement, Texaco regularly "bailed" the wells during 1984. The bailing proved unsuccessful.

XIX

Texaco was able to monitor one parameter of ground water contamination which is not affected by high pH readings from the cement grout. That parameter, "total organic carbon," was normal. This is a gross indication that no contamination had occurred, though not fully reliable or complete.

XX

On December 4, 1984, DOE assessed a $10,000 civil penalty against

Texaco for failure to comply with WAC 173-303-400(3) requiring a ground water monitoring system capable of determining the facility's impact on the quality of the ground water. Texaco appealed to this Board on April 11, 1985, which is the matter now before us.

XXI

Also on December 4, 1984, DOE issued a second regulatory order (No. DE 84-683) to Texaco requiring replacement of the unsuccessful 1984 wells. This was appealed to this Board as PCHB No. 85-3 and settled by agreed order entered March 14, 1985.

XXII

Six wells were installed by Texaco in 1985 pursuant to the agreed order in PCHB No. 85-3. These were installed at a cost to Texaco of $22,000. This brought to 17 the number of ground water monitoring wells installed by Texaco at the site.

XXIII

The six wells installed in 1985 were constructed without adherance to the now advisory chapter 173-160 WAC of DOE. Thus, a cement grout only five, rather than 18 feet, was employed. The well diameter was 2 inches, rather than 4 inches, allowing easier insertion of bentonite for sealing the cement grout. These 6 wells do not exhibit the cement -pH problem of the wells in question. Texaco's ground water monitoring system is therefore performing satisfactorily so far as is known at this time.

XXIV

Any Conclusion of Law which is deemed a Finding of Fact is hereby

adopted as such.

From these Findings of Fact the Board comes to these

CONCLUSIONS OF LAW

I

In failing to establish, by 1981, a ground water monitoring system capable of determining its facility's impact on the quality of the ground water, Texaco violated WAC 173-303-400(3) and 40 CFR Part 265 adopted thereby. We hold that the rule just cited is one of strict liability consonant with the compelling importance of protecting the ground waters from contamination.

II

RCW 70.105.080 provides for the issuance of a civil penalty for a violation such as has occurred. However, the amount of a penalty is a matter involving consideration of factors bearing on its reasonableness. These include:

1. The nature of the violation.
2. The prior actions of the violator.
3. Actions taken after the violation to solve the problem.

See Centralia v. DOE, PCHB No. 84-287 (1985).

III

The nature of the violation. This violation is not the result of inattention nor neglect by Texaco. From the outset, Texaco has made reasonable attempts to comply with ground water monitoring requirements. It has acceded to changing standards and interpretations in this newly developing area of regulation. DOE was

correct to require shallow wells in the perched aquifer despite other opinions on the matter. This is essential if contamination is to be detected and stopped at the outset. However, we believe that DOE may not have fully realized that Texaco was attempting to comply with this requirement while also complying with the DOE requirements for well construction which had not been developed for shallow monitoring wells but rather for water wells. DOE itself has realized the incongruity of these dual requirements by making the water well rules advisory. Texaco has apparently shown that for shallow monitoring wells, the water well construction rules may better be viewed with caution. This is a process in which Texaco and DOE have learned together.

Further, Texaco made continuous efforts to bring their wells into compliance by bailing, and remained in regular communication with DOE.

Moreover, there has been no proof of any actual contamination of ground water in this matter.

IV

Prior behavior of the violator. Because this penalty is not specific to a particular day or time, it is difficult to assess the prior behavior of the violator. No violations were shown prior to 1981. The course of events since 1981 shows that Texaco, prior to the present time, has worked earnestly to install a ground water monitoring system. The only shortcoming purely of Texaco's own making may have been a reluctance to give up the effort to rehabilitate its wells in question before starting over with new wells. Even this was not an extreme shortcoming in the circumstances.

V

Actions taken after the violation to solve the problem. Texaco has apparently established, so far as is known now, an acceptable ground water monitoring system at Marches Point. It has solved the cement -pH problem.

VI

Summary. In view of the nature of the violation, the behavior of the violator and the action taken to cure the violation, the $10,000 civil penalty is excessive and should be abated to $1,500.

VII

Any Findings of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law the Board enters this

ORDER

The violation for which Department of Ecology has cited Texaco, Inc., is affirmed. The civil penalty is abated to $1,500.

DONE at Lacey, Washington, this 9th day of October, 1985.

POLLUTION CONTROL HEARINGS BOARD

LAWRENCE J. FAULK, Chairman

GAYLE ROTHROCK, Vice Chairman

WICK DUFFORD, Lawyer Member

WILLIAM A. HARRISON
Administrative Appeals Judge